No. 81-1615

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1981

IN THE MATTER OF JEANNE STEINHARDT, as Executrix of JAMES McKEE, JR.,

Appellant,

vs.

JOHNS-MANVILLE CORPORATION, et al.,

Appellees.

On Appeal from the
New York Court of Appeals

APPELLANT'S REPLY BRIEF

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THE COURT BELOW EXPRESSLY NOTED THAT ITS DECISION DID NOT REST UPON ANY INDEPENDENT, ADEQUATE STATE GROUND.

The purpose of the rule first announced in *Murdock* v. *City of Memphis*, 20 Wall. 590, 22 L.Ed 429 (U.S. 1875), is, "to refrain from reaching advisory opinions or passing upon moot questions." *Fay* v. *Noia*, 372 U.S. 391. 429-30 (1963). The New York Court of Appeals would not have amended its remititur to expressly note that the constitutional issues were "necessarily passed upon"[1] if, in its opinion, the dispute could have been

[1] See Appellant's Jurisdictional Statement at A-19.

determined without adjudication of the constitutional question. This is a rule well established in New York. *People ex. rel. Henderson* v. *Supervisors*, 147 N.Y. 1, 15-16 (1895); *People ex. rel. Gugenheim* v. *Mucci*, 32 N.Y.2d 307, 311-12 (1973). Thus in the view of the court below there was never any independent, adequate state grounds upon which it could rest its decision and consequently avoid any constitutional involvement.

Furthermore, appellant did not argue in the courts below for a discovery rule as appellees erroneously contend in their motions to dismiss. Appellant urged in her brief[2] filed below that as a date of injury state New York is in constitutional error in its difference from other date of injury states who have interpreted their accrual rule in satisfaction of their due process obligations. *See, e.g., Locke* v. *Johns-Manville Corporation*, 275 S.E.2d 900 (Va.Sup.Ct. 1981); *Karjala* v. *Johns-Manville Corporation*, 523 F.2d 155, 159-61 (8th Cir. 1975) (applying Minnesota Law).

None of the courts below made any determination whether this action could be barred by New York CPLR 203(f). The sole basis for barring these claims employed by the courts below was CPLR 214(5). *See* Jurisdictional Statement at A-2 to A-16.

Adjudication of the federal question presented by the Jurisdictional Statement was an unavoidable aspect to the New York Court of Appeals' decision. Merely reaffirming that the date of injury equates with the date of exposure or inhalation to the harmful substance does not finally determine appellant's claim, *i.e.*, that such an interpretation of §214(5) conflicts with United States Supreme Court precedent. The court below could not rest its decision solely upon its historical definition of the "date of injury", but instead had to adjudicate appellant's claim that this definition was at odds with the federal constitution.

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[2]See excerpts from Appellant's reply brief filed below appended *infra*.

Thus the court below noted that, "there was . . . necessarily[3] passed upon a question under the Constitution of the United States . . . ." (Jurisdictional Statement at A.-19). Therefore, there was no "independent" State grounds for the decision appealed from.

> Of course, it is not open to us to revise the construction placed upon the statute by the State court, but it is open to us to determine whether the application made of the statute in this instance was so arbitrary as to contravene the fundamental principles of justice which the constitutional guaranty of due process of law is intended to perserve. *Sw. Teleg. and Telegph. Co.* v. *Danaher*, 238 U.S. 482, 489 (1914).

And again in *Enterprise Irrigation District* v. *Farmers' Mutual Canal Company*, 243 U.S. 157, 164 (1916), this Court stated:

> [W]here the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain (citation omitted).

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[3] "But if it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is *necessary* to any final judgment in the case, or that there has been no decision by the State court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the Federal question, then this court will reverse the judgment of the State court, and will either render such judgment here as the State court should have rendered, or remand the case to that court, as the circumstances of the case may require." *Murdock* v. *City of Memphis*, 20 Wall. at 363, 22 L.Ed. at 444 (emphasis supplied).

The motions to dismiss should be denied.

Respectfully submitted,

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